

THE HARBOR LAW GROUP

Kira M. Rubel, Esq.
3615 Harborview Drive, NW, Suite C.
Gig Harbor, WA 98332-2129
Telephone: (253) 358-2215
kira@theharborlawgroup.com

IJH LAW

Ignacio J. Hiraldo, Esq. (*pro hac vice* to be filed)
1200 Brickell Ave. Ste. 1950
Miami, FL 33131
Telephone: (786) 496-4469
ijhiraldo@ijhlaw.com

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

MARK BRYANT, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

FISHER INVESTMENTS, INC.,

Defendant.

Case No.

CLASS ACTION

COMPLAINT FOR DAMAGES

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Mark Bryant brings this class action against Defendant Fisher Investments, Inc. (“Defendant”) and alleges as follows upon personal knowledge as to themselves and their own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.

NATURE OF THE ACTION

This is a putative class action pursuant to the Telephone Consumer Protection Act, 47 U.S.C. §§ 227, *et seq.* (the “TCPA”).

1 Defendant is a “fee-only investment adviser serving institutional and private clients
2 globally.”¹

3 2. Defendant violated the TCPA by using an automatic telephone dialing system to place
4 mass automated marketing calls to individuals’ cellular phone numbers without first obtaining the
5 required express written consent, *and* in violation of the National Do Not Call Registry.

6 3. Through this action, Plaintiff seeks injunctive relief to halt Defendant’s illegal conduct,
7 which has resulted in the invasion of privacy, harassment, aggravation, and disruption of the daily life
8 of thousands of individuals. Plaintiff also seeks statutory damages on behalf of themselves and
9 members of the Class, and any other available legal or equitable remedies.
10

11 **JURISDICTION AND VENUE**

12 4. This Court has federal question subject matter jurisdiction over this action pursuant to
13 28 U.S.C. § 1331, as the action arises under the Telephone Consumer Protection Act, 47 U.S.C. §§ 227,
14 *et seq.* (“TCPA”).

15 5. The Court has personal jurisdiction over Defendant and venue is proper in this District
16 because Defendant’s principal place of business is in this District.
17

18 **PARTIES**

19 6. Plaintiff is a natural person who, at all times relevant to this action, was a citizen and
20 domiciled in the State of North Carolina.

21 7. Defendant is a Delaware corporation whose principal office is located at 5525 NW
22 Fisher Creek Drive, Camas, WA 98607. Defendant directs, markets, and provides its business activities
23 throughout the state of North Carolina.
24

25
26
27 ¹ <https://www.fisherinvestments.com/en-us/about> (last visited March 11, 2021).
28

8. Unless otherwise indicated, the use of Defendant's name in this Complaint includes all agents, employees, officers, members, directors, heirs, successors, assigns, principals, trustees, sureties, subrogees, representatives, vendors, and insurers of Defendant.

THE TCPA

9. The TCPA prohibits: (1) any person from calling a cellular telephone number; (2) using an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice; (3) without the recipient’s prior express consent. 47 U.S.C. § 227(b)(1)(A).

10. In an action under the TCPA, a plaintiff must show only that the defendant “called a number assigned to a cellular telephone service using an automatic dialing system or prerecorded voice.” *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014).

11. The Federal Communications Commission (“FCC”) is empowered to issue rules and regulations implementing the TCPA. According to the FCC’s findings, calls in violation of the TCPA are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

12. In 2012, the FCC issued an order further restricting automated telemarketing calls, requiring “prior express written consent” for such calls. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012) (emphasis supplied).

1 13. To obtain express written consent for telemarketing calls, a defendant must establish
2 that it secured the plaintiff's signature in a form that gives the plaintiff a "'clear and conspicuous
3 disclosure' of the consequences of providing the requested consent....and having received this
4 information, agrees unambiguously to receive such calls at a telephone number the [plaintiff]
5 designates." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R.
6 1830, 1837 ¶ 18, 1838 ¶ 20, 1844 ¶ 33, 1857 ¶ 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

7 14. The TCPA regulations promulgated by the FCC define "telemarketing" as "the
8 initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or
9 investment in, property, goods, or services." 47 C.F.R. § 64.1200(f)(12). In determining whether a
10 communication constitutes telemarketing, a court must evaluate the ultimate purpose of the
11 communication. *See Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 820 (8th Cir. 2015).

12 15. "Neither the TCPA nor its implementing regulations 'require an explicit mention of a
13 good, product, or service' where the implication of an improper purpose is 'clear from the context.'"
14 *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012)).
15

16 16. "'Telemarketing' occurs when the context of a call indicates that it was initiated and
17 transmitted to a person for the purpose of promoting property, goods, or services." *Golan*, 788 F.3d at
18 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R. § 64.1200(f)(12); *In re Rules and Regulations*
19 *Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003
20 WL 21517853, at *49).
21

22 17. The FCC has explained that calls motivated in part by the intent to sell property, goods,
23 or services are considered telemarketing under the TCPA. *See In re Rules and Regulations*
24 *Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶¶ 139-142 (2003).
25
26
27
28

1 This is true whether call recipients are encouraged to purchase, rent, or invest in property, goods, or
2 services during the call *or in the future. Id.*

3 18. In other words, offers “that are part of an overall marketing campaign to sell property,
4 goods, or services constitute” telemarketing under the TCPA. *See In re Rules and Regulations*
5 *Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 136 (2003).

6 19. If a call is not deemed telemarketing, a defendant must nevertheless demonstrate that it
7 obtained the plaintiff’s prior express consent. *See In the Matter of Rules and Regulations Implementing*
8 *the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7991-92 (2015) (requiring express consent
9 “for non-telemarketing and non-advertising calls”).

10 20. In regards to what constitutes an ATDS, the Ninth Circuit has explained “that the
11 statutory definition of ATDS includes device that stores telephone numbers to be called, whether or not
12 those numbers have been generated by a random or sequential number generator.” *Marks v. Crunch*
13 *San Diego, LLC*, 904 F. 3d 1041, 1043 (9th Cir. 2018).

14 21. The Ninth Circuit has further explained that “By referring to the relevant device as an
15 ‘automatic telephone dialing system,’ Congress made clear that it was targeting equipment that could
16 engage in automatic dialing, rather than equipment that operated without any human oversight or
17 control.” *Marks*, 904 F. 3d at 1052 (citing 47 U.S.C. § 227(a)(1)) (emphasis in *Marks*).

18 **FACTS**

19 22. Beginning in approximately Fall of 2020, Defendant, or a third party under direction
20 of Defendant, began calling Plaintiff’s cellular telephone number ending in 1809 (the “1809
21 Number”).

22 23. The telephone calls Plaintiff received originated from numerous telephone numbers,
23 including 919-659-7211.
24
25
26
27
28

1 24. The telephone number 919-659-7211 is owned and/or operated by Defendant.

2 25. In total, Defendant has called the 1809 number approximately fifteen times.

3 26. Upon Plaintiff answering the phone, Plaintiff heard a noticeable pause before being
4 greeted by a live person. This pause is indicative of automatic telephone dialing system (“ATDS”)
5 technology.

6 27. To place the calls, Defendant used telephone dialing software that permitted Defendant
7 to transmit thousands of calls without any meaningful human involvement (the “Platform”).
8

9 28. The Platform has the capacity to store telephone numbers, which capacity was in fact
10 utilized by Defendant.

11 29. The Platform has the capacity to generate sequential numbers, which capacity was in
12 fact utilized by Defendant.

13 30. The Platform has the capacity to dial numbers in sequential order, which capacity was
14 in fact utilized by Defendant.

15 31. The Platform has the capacity to dial numbers from a list of numbers, which capacity
16 was in fact utilized by Defendant.
17

18 32. The Platform has the capacity to dial numbers without human intervention, which
19 capacity was in fact utilized by Defendant.

20 33. At the time Plaintiff received these calls and messages Plaintiff was the subscriber
21 and/or sole user of the 1809 Number.

22 34. The 1809 Number is Plaintiff’s personal cell phone number and not a business phone
23 number.
24

25 35. The 1809 Number has been registered with the National Do Not Call Registry since
26 October 24, 2009.
27
28

36. Defendant's calls constitute telemarketing/advertising/solicitations because they encourage the future purchase or investment in property, goods, or services; specifically, the use of Defendant's financial services.

37. At no point in time did Plaintiff provide Defendant with their express written consent to be contacted by marketing telephone calls using an ATDS.

38. Plaintiff asked Defendant multiple times to cease calling the 1809 Number. Despite this, Defendant placed calls to the 1809 Number after Plaintiff's request to cease calls to the 1809 Number.

39. Plaintiff has not purchased or transacted with Defendant in the 18-months prior to receipt of the first call from Defendant.

40. Plaintiff has never provided the 1809 Number to Defendant.

41. Defendant's unsolicited communications caused Plaintiff harm, including invasion of privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion. Defendant's call also inconvenienced Plaintiff and caused disruption to their daily life.

CLASS ALLEGATIONS

PROPOSED CLASS

42. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of Plaintiff and all others similarly situated.

43. Plaintiff brings this case on behalf of the Class defined as follows:

ATDS CLASS: All persons within the United States to who, within the four years prior to the filing of this Complaint, (1) Defendant or anyone on Defendant's behalf, (2) placed a telephone call, (3) using the same type of equipment used to call Plaintiff, (4) to said person's cellular telephone number, (5) for the purpose of promoting and/or advertising Defendant's goods and/or services.

DO NOT CALL CLASS: All persons in the United States who from four years prior to the filing of this action: (1) were sent a phone call by or on behalf of Defendant; (2) more than one time within any 12-month period; (3) where the person's telephone number had been listed on the National Do Not Call Registry for at least thirty days; (4)

1 for the purpose of advertising and/or promoting and/or soliciting Defendant's products
2 and services.

3 44. Plaintiff reserves the right to modify the Class definitions as warranted as facts are
4 learned in further investigation and discovery.

5 45. Defendant and its employees or agents are excluded from the Classes. Plaintiff does not
6 know the number of members in the Classes but believes the Classes members number in the several
7 thousands, if not more.

8 **NUMEROSITY**

9 46. Upon information and belief, Defendant has placed automated calls to cellular telephone
10 numbers belonging to thousands of consumers throughout the United States without their prior express
11 consent. The members of the Classes, therefore, are believed to be so numerous that joinder of all
12 members is impracticable.

13 47. The exact number and identities of the members of the Class are unknown at this time
14 and can only be ascertained through discovery. Identification of the Class members is a matter capable
15 of ministerial determination from Defendant's call records.

16 **COMMON QUESTIONS OF LAW AND FACT**

17 48. There are numerous questions of law and fact common to members of the Class which
18 predominate over any questions affecting only individual members of the Class. Among the questions
19 of law and fact common to the members of the Class are:
20

21 a) Whether Defendant made non-emergency calls to Plaintiff's and Class members'
22 cellular telephones using an ATDS;
23

24 b) Whether Defendant can meet its burden of showing that it obtained prior express
25 written consent to make such calls;
26

27 c) Whether Defendant's conduct was knowing and willful;
28

d) Whether Defendant initiated telemarketing calls to telephone numbers listed on the National Do Not Call Registry;

e) Whether Defendant is liable for damages, and the amount of such damages; and

f) Whether Defendant should be enjoined from such conduct in the future.

49. The common questions in this case are capable of having common answers. If Plaintiff's claim that Defendant routinely transmits calls to telephone numbers assigned to cellular telephone services is accurate, Plaintiff and the Class members will have identical claims capable of being efficiently adjudicated and administered in this case.

TYPICALITY

50. Plaintiff's claims are typical of the claims of the Class members, as they are all based on the same factual and legal theories.

PROTECTING THE INTERESTS OF THE CLASS MEMBERS

51. Plaintiff is a representative who will fully and adequately assert and protect the interests of the Class, and has retained competent counsel. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE

52. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit, because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by the Class are in the millions of dollars, the individual damages incurred by each member of the Class resulting from Defendant's wrongful conduct are too small to warrant the expense of individual lawsuits. The likelihood of individual Class members prosecuting their own separate claims is remote,

1 and, even if every member of the Class could afford individual litigation, the court system would be
2 unduly burdened by individual litigation of such cases.

3 53. The prosecution of separate actions by members of the Class would create a risk of
4 establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For example,
5 one court might enjoin Defendant from performing the challenged acts, whereas another may not.
6 Additionally, individual actions may be dispositive of the interests of the Class, although certain class
7 members are not parties to such actions.
8

9 **COUNT I**
10 **Violations of the TCPA, 47 U.S.C. § 227(b) and 47 C.F.R. § 64.1200**
11 **(On Behalf of Plaintiff and the ATDS Class)**

12 54. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set forth herein.

13 55. It is a violation of the TCPA to make “any call (other than a call made for emergency
14 purposes or made with the prior express consent of the called party) using any automatic telephone
15 dialing system ... to any telephone number assigned to a ... cellular telephone service” 47 U.S.C. §
16 227(b)(1)(A)(iii).

17 56. It is also a violation of the TCPA regulations promulgated by the FCC to “initiate any
18 telephone call...using an automatic telephone dialing system...To any telephone number assigned to a
19 paging service, cellular telephone service, specialized mobile radio service, or other radio common
20 carrier service, or any service for which the called party is charged for the call.” 47 C.F.R. §
21 64.1200(a)(1)(iii).

22 57. Additionally, it is a violation of the TCPA regulations promulgated by the FCC
23 to “[i]nitiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or
24 constitutes telemarketing, using an automatic telephone dialing system...other than a call made with the
25
26
27
28

1 prior express written consent of the called party or the prior express consent of the called party when
2 the call is made ...” 47 C.F.R. § 64.1200(a)(2).

3 58. The TCPA defines an “automatic telephone dialing system” (hereinafter “ATDS”) as
4 “equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a
5 random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1).

6 59. Defendant used an ATDS to make non-emergency telephone calls to the cellular
7 telephones of Plaintiff and the other members of the Class defined below.

8 60. These calls were made without regard to whether or not Defendant had first obtained
9 express permission from the called party to make such calls.

10 61. In fact, Defendant did not have prior express consent to call the telephones of Plaintiff
11 and the other members of the putative Class when its calls were made.

12 62. Defendant has, therefore, violated § 227(b)(1)(A)(iii) and 47 C.F.R. § 64.1200(a) of the
13 TCPA by using an ATDS to make non-emergency telephone calls to the cell phones of Plaintiff and the
14 other members of the putative Class without their prior express written consent.

15 63. Defendant knew that it did not have prior express consent to make these calls and knew,
16 or should have known, that it was using equipment that at constituted an automatic telephone dialing
17 system. The violations were therefore willful or knowing.

18 64. As a result of Defendant’s conduct and pursuant to § 227(b)(3) of the TCPA, Plaintiff
19 and the other members of the putative Class were harmed and are each entitled to a minimum of \$500.00
20 in damages for each violation.

21 65. Plaintiff and the members of the Class are also entitled to an injunction against future
22 calls.

COUNT II
Violations of 47 C.F.R. § 64.1200(c)
(On Behalf of Plaintiff and the Do Not Call Class)

66. Plaintiff re-alleges and incorporates the allegations of paragraphs 1-55 as if fully set forth herein.

67. The TCPA's implementing regulation, 47 C.F.R. § 64.1200(c), provides that "[n]o person or entity shall initiate any telephone solicitation" to "[a] residential telephone subscriber who has registered their telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government."

68. 47 C.F.R. § 64.1200(e), provides that § 64.1200(c) and (d) "are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers."

69. 47 C.F.R. § 64.1200(d) further provides that "[n]o person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity."

70. Any "person who has received more than one telephone call within any 12- month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may" may bring a private action based on a violation of said regulations, which were promulgated to protect telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. 47 U.S.C. § 227(c).

71. Defendant violated 47 C.F.R. § 64.1200(c) by initiating, or causing to be initiated, telephone solicitations to telephone subscribers such as Plaintiff and the Do Not Call Registry Class members who registered their respective telephone numbers on the National Do Not Call Registry, a listing of persons who do not wish to receive telephone solicitations that is maintained by the federal government.

72. Defendant violated 47 U.S.C. § 227(c)(5) because Plaintiff and the Do Not Call Registry Class received more than one telephone call in a 12-month period made by or on behalf of Defendant in violation of 47 C.F.R. § 64.1200, as described above.

73. As a result of Defendant's conduct as alleged herein, Plaintiff and the Do Not Call Registry Class suffered actual damages and, under section 47 U.S.C. § 227(c), are entitled, inter alia, to receive up to \$500 in damages for such violations of 47 C.F.R. § 64.1200.

74. To the extent Defendant's misconduct is determined to be willful and knowing, the Court should, pursuant to 47 U.S.C. § 227(c)(5), treble the amount of statutory damages recoverable by the members of the Do Not Call Registry Class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Classes, prays for the following relief:

- a) An order certifying this case as a class action on behalf of the Classes as defined above, and appointing Plaintiff as the representative of the Classes and Plaintiff's counsel as Class Counsel;
- b) An award of actual and statutory damages for Plaintiff and each member of the Class;
- c) As a result of Defendant's negligent violations of 47 U.S.C. §§ 227, *et seq.*, and its implementing regulations, Plaintiff seeks for themselves and each member of the Class \$500.00 in statutory damages for each and every violation pursuant to 47 U.S.C. § 277(b)(3);
- d) As a result of Defendant's knowing and/or willful violations of 47 U.S.C. §§ 227, *et seq.*, and its implementing regulations, Plaintiff seeks for themselves and each

member of the Classes treble damages, as provided by statute, up to \$1,500.00 for each and every violation pursuant to 47 U.S.C. § 277(b)(3)(B) and § 277(b)(3)(C);

- e) An order declaring that Defendant's actions, as set out above, violate the TCPA;
- f) An injunction requiring Defendant to cease all unsolicited call activity, and to otherwise protect the interests of the Class;
- g) An injunction prohibiting Defendant from using, or contracting the use of, an ATDS without obtaining, recipient's consent to receive calls made with such equipment;
- h) Such further and other relief as the Court deems necessary.

JURY DEMAND

Plaintiff hereby demands a trial by jury.

DOCUMENT PRESERVATION DEMAND

Plaintiff demands that Defendants take affirmative steps to preserve all records, lists, electronic databases or other itemizations associated with the allegations herein, including all records, lists, electronic databases or other itemizations in the possession of any vendors, individuals, and/or companies contracted, hired, or directed by Defendant to assist in sending the alleged communications.

DATED: April 9, 2021

Respectfully Submitted,

/s/ Kira M. Rubel

Kira M. Rubel, WSBA #51691

THE HARBOR LAW GROUP

3615 Harborview Drive, NW, Suite C

Gig Harbor, WA 98332-2129

Telephone: (253) 358-2215

kira@theharborlawgroup.com

IJH LAW

Ignacio J. Hiraldo, Esq. (*pro hac vice to be filed*)
1200 Brickell Ave. Ste. 1950
Miami, FL 33131
Telephone: (786) 496-4469
ijhiraldo@ijhlaw.com

Counsel for Plaintiff